

OGC 73-1005

5 June 1973

OGC Has Reviewed

MEMORANDUM FOR THE RECORD

SUBJECT: Copyright Infringement

STATINTL

1. Recently, [REDACTED] Petroleum Branch, Office of Economic Research, requested the advice of this Office on the copyright infringement implications of World Oil, which is their annual survey of the petroleum industry. The question arises this year because of the desire to attribute the publication to the Agency. In years past, the document was published un-attributed.

2. World Oil has been published in two previous editions; previous to that it was limited to the Middle East and was entitled the Middle East Oil Statistical Summary. A large number of copies of each publication have been distributed both within and outside of the Government. A substantial number of the copies distributed outside of the Government were given to various members of the general public by our Domestic Contact Service.

3. In the United States the statutory criteria for copyrights are contained in Title 17 of the U.S. Code. It states that any person entitled to a copyright shall have the exclusive right to print, reprint, publish, copy and vend the copyrighted work (17 U.S.C.A. 1). Furthermore, the copyright protects all the copyrightable component parts of the work copyrighted (17 U.S.C.A. 3).

4. Copyright infringement involves copying, in whole or in part, either verbatim or by paraphrasing. Complete or substantial identity between the copyrighted work and the infringing work is not required (Addison-Wesley Publishing Co. v. Brown, 223 F. Supp. 219, 1963). Infringement has been found when only a small part of a book was copied (Henry Holt & Co. v. Ligget & Myers Tobacco Co., 23 F. Supp. 302, 1938). If so much is taken that the value of the original is substantially diminished or if the labors of the original author are substantially, and to an injurious extent, appropriated there is infringement (Toksvig v. Bruce Publishing Co., 181 F.2d 664, 1950).

5. Fair use has been defined as a privilege to use the copyrighted material in a reasonable manner without the consent of the owner (Toksvig). The line between fair use and infringement is not sharply drawn and is not easily defined. Whether there is a fair use is a question of fact and depends on many circumstances; however, copying from another's work merely to save the labor of independently producing the matter copied is not within the fair use doctrine (Toksvig). Although a compiler of material that is within the public domain does not acquire a monopoly over that material and any other person by going to the original material may produce a work similar to that of the first compiler, the second compiler may not use the labors of the first merely to save his own time (Benny v. Lowe's Inc., 239 F.2d 532, 1956). While the case was decided some years ago, American Trotting Register Ass'n v. Goocher, 70 F. 237 (1895), continues to stand today. In that case, which in many respects is analogous to the instant case, the copyright owner, at considerable expense and labor and from original sources, published factual data and statistics on trotting and pacing horses in the form of copyrighted yearbooks. The infringer compiled a list of trotters and pacers having records of 2:30 or better from the yearbooks. The court found at 70 F. 237 that:

There are numerous cases which hold that any compilation or any table of statistics which are the result of the author's industry, and which are gathered at his expense, can not be bodily used by an infringer. Although the same facts

could be gathered by the infringer /from independent sources/, he must do so at his own expense, and as a result of his own industry. It would be wrong to permit him to extract bodily, from a copyrighted book, tables, facts, and statistics, and hand them over to the printer....

In a similar case, Egbert v. Greenberg, 100 F.447 (1900), the holding in Goocher was followed. In a much more recent case Triangle Publications v. New England Newspaper Publishing Co., 46 F. Supp. 198, (1942), the court found infringement when an individual copied the symbols, mathematical notations, and cryptic expressions from copyrighted horse race result charts and produced similar charts stating the same information in equivalent words. In an article on fair use entitled "Fair Use of Copyrighted Books" (2 Houston Law Review 206, 1964) the author suggests a number of rules concerning fair use, two of which are relevant here. He states that "(a) one cannot adopt a prior book and expand on it, and (b) one cannot merely adopt substantial portions of a prior work and expand upon them, either by addition or modernization."

6. Intention to infringe is not essential and lack of knowledge that the infringed material was copyrighted is not a defense (Chappell & Co. v. Costs, 45 F. Supp. 554, 1942). Imposition of liability in the absence of an intention to infringe or knowledge of infringement is not unusual (Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 1963). The fact that the infringer acknowledges the source from which the appropriated matter was derived does not excuse the infringement (Toksvig). In Study No. 10 (dtd. August 1958) entitled "Fair Use of Copyrighted Works" prepared for the U.S. Copyright Office in contemplation of a general revision of the copyright laws, the author, citing Holt, states that "i/n any event, it is clear that acknowledgement, in itself, is not sufficient to insure fair use and preclude infringement".

7. One of the methods in which the United States grants copyright protection to the copyrights of certain other countries is through its ratification of the Universal Copyright Convention (U.C.C.). As a general rule, the U.C.C. requires a participating country to give the same protection to foreign works that meet the Convention requirements as it gives to its own domestic works. The United Kingdom and France are both members of the U.C.C. In addition, the U.S. has bilateral copyright protection agreements with each of these countries.

8. World Oil '71 is a compilation of statistics about the world petroleum industry. It is compiled through the use of a number of other publications, some copyrighted and some not. Here we are concerned only with those copyrighted publications that are used, which for World Oil '71 were (1) Oil and Gas Journal, (2) International Petroleum Encyclopedia, and (3) 1971 Oil Statistics. The first two are published by the Petroleum Publishing Co., Tulsa, Oklahoma, and the latter by the Organization for Economic Co-operation and Development, Paris, France. In addition, O.E.R. will again use Skinner's Oil and Petroleum International Year Book for compiling the forthcoming World Oil. The most recent edition of Skinner's has been copyrighted (apparently for the first time as the previous edition that was used to compile World Oil '71 was not copyrighted) by F.T. Business Publications LTD., London, England.

9. Petroleum production and refining data was incorporated into World Oil directly from the Oil and Gas Journal. Various regional and country maps depicting the location of oil and gas fields, pipelines, refineries, and tanker terminals have been revised from similar maps in the International Petroleum Encyclopedia. And, the table in World Oil '71 entitled "Western Europe: Imports of Crude Oil, by Country of Origin, 1970" was derived directly from 1971 Oil Statistics. From these facts and based on the judicial standards discussed above, we are of the opinion that there are at least two, and possibly three, separate causes of action for infringement in World Oil '71. In the publications previous to World Oil '71, the table derived from Oil Statistics was not included; thus, only one or possibly two causes of action lie for infringements in these publications. Furthermore, while a question of fact, it is our opinion that the infringements are not excused by the fair use doctrine. In addition, it is our opinion that the future use of the copyrighted version of Skinner's will constitute another cause of action for infringement.

10. Infringements of copyrighted material made by or on behalf of the United States are now governed by statute (28 U.S.C. 1498(b)). Whenever a copyright protected under

the laws of the United States is infringed by the United States or by any person or contractor acting for the Government and with its authorization or consent, the owner's exclusive remedy is by suit against the United States in the Court of Claims. The Code also provides for the compromise settlement of any claim which the copyright owner may have against the Government by reason of infringement. The statute of limitations is three years from the date of infringement (28 U.S.C.A. 1498(b)). Specifically excluded, however, are claims for infringement arising in foreign countries.

11. The legislative history for Section 1498(b) shows that its purpose is to waive the sovereign immunity of the United States against suit for copyright infringement. It is intended to protect Government employees, acting within the scope of their employment. In those cases where the Section 1498(b) applies, the remedy provided is exclusive. This means that neither civil nor criminal process may be issued against the employee.

12. The Code gives the copyright owner various remedies for the infringement of his work. These remedies, which are cumulative and not alternative, are (a) injunctive relief, (b) damages the owner suffers plus profits made by the infringer or statutory damages, and (c) destruction of the infringing copies and printing plates (17 U.S.C.A. 101). The copyright owner will be able to receive injunctive relief only if the court has reason to believe the copyright infringement will continue (Shapiro, Bernstein & Co. v. Bleeker, 243 F. Supp. 999, 1965). Whether the award is to be for actual damages inflicted or statutory damages is decided by the court from the nature of the case, particularly in those cases in which it is difficult or impossible to prove damages or discover profits. The statutory damages are such damages that to the court appear just; however, the damages shall not be less than \$250, or more than \$5,000. Moreover, for infringements involving books the Code provides a scale for the court's use which amounts to \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees (17 U.S.C.A. 101). The Agency published 900 copies of World Oil '71, 700 copies of the first World Oil, and 533 copies of the last Middle East Summary--published in August 1970. The three-year statute of limitations has run for earlier publications

of the Middle East Summary. Therefore, the Agency remains liable for 2,133 copies of infringing material. At \$1 per infringing copy, the total statutory damages that the Agency may already be liable for range between \$3,033 and \$5,166 (depending on the number of causes of action) plus attorney's fees. Based on these facts, it is our opinion that a court would probably conclude that the damages were not "de minimus".

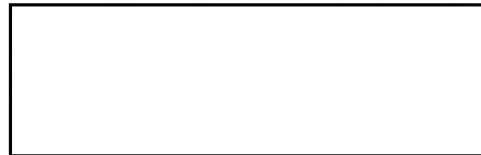
13. Notwithstanding the fact that the Agency may already be liable for past infringements, we are currently planning to publish a revised edition of World Oil. The fact that we did not attribute past versions to the Agency has no bearing on our liability, nor will attribution effect any future liability. In terms of future publications there are a number of courses of action that we can take. We can (1) refrain from future publication, (2) refrain from using the copyrighted materials as source materials for future publications, (3) obtain permission from the copyright owners to use their material, (4) attempt to conceal the infringement from copyright owners by (a) controlling the distribution, or (b) coloring the use of the infringing data to disguise its use or (5) distribute as in the past. As it is our opinion that alternatives (4) and (5) will continue to incur liability and, as that liability is not "de minimus", we do not think these are legally viable or prudent choices. This conforms to the policy set forth in the Code of Federal Regulations. There, at 41 CFR 5-54.202 (concerning Public Contracts and Property Management) it states:

It is general Government policy that copyrighted matter will not knowingly be incorporated in publications prepared by or for the Government except with the written consent of the copyright owner.

We are aware that pursuing some of the other alternatives, i.e., attempting to obtain permission to use copyrighted material, raises the risk that we may reveal to the copyright owners our past infringement; however, it is our opinion that this risk is less than that of continuing to incur liability as we have in the past. If we can avoid future liability our current liability will be completely eliminated by the running of the three-year statute of limitations in mid-1975.

14. As alternatives (1), (2) or (3) do not incur liability, we have no legal objections to any of these three courses of action. Lastly, O.E.R. should be aware that the OFFICIAL USE ONLY control is no longer a valid caveat under Executive Order 11652. Moreover, World Oil does not appear to meet the criteria set forth in Executive Order 11652 to be classified. If we distribute the document as in the past to the general public, we see no legal basis for denying certain segments of the public access to the publication while at the same time making it available to others; therefore, it is our opinion that the publication cannot fall within the exemption provisions of the Freedom of Information Act (P. L. 90-23, as amended).

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Office of General Counsel

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1 - Signer

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